

ESTTA Tracking number: **ESTTA255422**

Filing date: **12/16/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	Innovation Ventures LLC d/b/a Living Essentials
Granted to Date of previous extension	01/03/2009
Address	46570 Humboldt Drive Novi, MI 48377 UNITED STATES
Attorney information	Chanille Carswell Brooks Kushman, P.C. 1000 Town Center, 22nd Fl. Southfield, MI 48075 UNITED STATES ccarswell@brookskushman.com, lsavage@brookskushman.com, akramer@brookskushman.com Phone:248-358-4400

### Applicant Information

Application No	77326312	Publication date	11/04/2008
Opposition Filing Date	12/16/2008	Opposition Period Ends	01/03/2009
Applicant	L. Perrigo Company 515 Eastern Avenue Allegan, MI 49010 UNITED STATES		

### Goods/Services Affected by Opposition


Class 005. All goods and services in the class are opposed, namely: Liquid dietary supplements
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### Grounds for Opposition

Deceptiveness	Trademark Act section 2(a)
False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)

### Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	3003077	Application Date	06/14/2004
Registration Date	09/27/2005	Foreign Priority Date	NONE
Word Mark	5 HOUR ENERGY		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 005. First use: First Use: 2005/06/00 First Use In Commerce: 2005/06/00 HOMEOPATHIC SUPPLEMENTS, PHARMACEUTICAL PREPARATIONS, NUTRITIONAL SUPPLEMENTS AND DIETARY SUPPLEMENTS THAT RELIEVE OR PREVENT FATIGUE

U.S. Application No.	77522602	Application Date	07/15/2008
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	5-HOUR ENERGY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2004/09/00 First Use In Commerce: 2004/09/00 DIETARY SUPPLEMENTS Class 032. First use: First Use: 2004/09/00 First Use In Commerce: 2004/09/00 ENERGY SUPPLEMENTS IN LIQUID FORM		

Attachments	78434496#TMSN.jpeg ( 1 page )( bytes ) 77522602#TMSN.jpeg ( 1 page )( bytes ) Microsoft Word - Notice of Opposition.pdf ( 5 pages )(38510 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/chanille carswell/
Name	Chanille Carswell
Date	12/16/2008

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Trademark Application

Serial No.: 77/326,312

Filed: November 9, 2007

Trademark: **5 HOUR LIFT**

Atty. Docket No.: LIV 0134 OC

Published in the Official Gazette on November 4, 2008

Innovation Ventures, LLC d/b/a Living Essentials )

)

Opposer, )

)

v. )

)

L. Perrigo Company )

)

Applicant. )

Opposition No. \_\_\_\_\_

**NOTICE OF OPPOSITION**

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Sir/Madam:

Opposer, Innovation Ventures, LLC d/b/a Living Essentials, a Michigan limited liability company with an address at 46570 Humboldt Drive, Novi, Michigan 48377 (“Living Essentials”), believes that it would be damaged by the registration of the mark 5 HOUR LIFT shown in U.S. Trademark Application Serial No. 77/326,312 and, therefore, asks the Commissioner to refuse the application.

As grounds of opposition, it is alleged that:

1. Living Essentials is the owner of the trademark 5-HOUR ENERGY for “homeopathic supplements, pharmaceutical preparations, nutritional supplements and dietary supplements that relieve or prevent fatigue.” *See* U.S. Reg. No. 3,003,077. Living Essentials also owns pending U.S. Trademark App. No. 77/522,602.

2. Living Essentials is a well-known and leading provider of homeopathic, nutritional and dietary supplements, including two-ounce energy shots (which are liquid energy supplements sold in two-ounce “shot” containers) under the 5-HOUR ENERGY mark.

3. Living Essentials has used the 5-HOUR ENERGY mark extensively since at least as early as September of 2004. Living Essentials has sold more than 133 million bottles of its 5-HOUR ENERGY shots in 2008 alone, and has spent more than \$35 million on advertising and promoting these products in 2008 alone. In addition, the products are sold through more than 120,000 retail outlets in the United States. As a result of this extensive use and promotion, the 5-HOUR ENERGY mark is extremely well-known as a brand and strong. In addition, this extensive use indicates that the mark 5-HOUR ENERGY has acquired distinctiveness.

4. Applicant, L. Perrigo Company (“Applicant” or “Perrigo”) filed an intent-to-use application for the mark 5 HOUR LIFT on November 9, 2007. As published, Perrigo’s application covers “liquid dietary supplements,” in International Class 5.

5. The U.S. Patent and Trademark Office assigned the subject application Serial No. 77/326,312.

6. Upon information and belief, the liquid dietary supplements for which the Applicant seeks registration of the mark 5 HOUR LIFT is identical with or substantially similar to the 5-HOUR ENERGY homeopathic, nutritional and dietary supplements, including liquid energy shots.

7. Living Essentials has made extensive prior use of the mark 5-HOUR ENERGY for homeopathic, nutritional and dietary supplements, including energy shots.

8. The Applicant filed its application for the mark 5 HOUR LIFT long after Living Essentials obtained trademark rights in the 5-HOUR ENERGY mark.

9. The Applicant's 5 HOUR LIFT mark creates a similar commercial impression and a likelihood of confusion because (1) the goods are the same or similar to those offered by Living Essentials under the 5 HOUR ENERGY mark, and (2) the Applicant's mark incorporates the identical "5 HOUR" phrase with the term "Lift," which carries a similar connotation to "Energy."

10. Upon information and belief, at the time Applicant filed its trademark application to register 5 HOUR LIFT, Applicant had knowledge that Living Essentials used the mark 5-HOUR ENERGY to identify its homeopathic, nutritional and dietary supplements-including energy shots.

11. The Applicant's mark so resembles Living Essentials' previously-used and registered 5-HOUR ENERGY mark as to be likely, when used in connection with Applicant's goods, to cause confusion, or to cause mistake, or to deceive under Section 2(d) of the Lanham Act, as amended, 15 USC § 1052(d).

12. Applicant's 5 HOUR LIFT mark falsely suggests a connection with Living Essentials under Section 2(a) of the Lanham Act, as amended, 15 USC § 1052(a).

13. For the foregoing reasons, Living Essentials will be damaged by the registration of the mark 5 HOUR LIFT.

WHEREFORE, Living Essentials respectfully requests the Commissioner refuse registration of the 5 HOUR LIFT trademark (Application Serial No. 77/326,312) and sustain Living Essentials' opposition as requested.

Respectfully submitted,

By /chanille carswell/  
Anessa Owen Kramer  
Chanille Carswell  
Attorneys for Opposer, Living Essentials

Date: December 11, 2008

**BROOKS KUSHMAN P.C.**  
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